No. 22635

In the

United States Court of Appeals

For the Ninth Circuit

Petra Wellens,

Appellant,

vs.

Frank J. Kurkowski and Mary Ann Kurkowski, husband and wife,

Appellees.

Appellees' Answering Brief

Kenneth Rossiter

Attorney for Appellees

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MISCELLANEOUS

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JURISDICTION

(a) The District Court.

That the court had jurisdiction was stipulated and agreed by all parties, both as to the principal litigation involving Stephen A. Barzelis, Personal Representative and Administrator of the Estate of Dena Barzelis, deceased, and Katherine Cotsirilos, as plaintiffs, and Frank J. Kulikowski and Marie Ann Kulikowski, husband and wife, and Petra Williams, a widow, as defendants. There was also agreement concerning the jurisdiction of the cross-claims of Kulikowski and Williams, which claims were ancillary to the principal litigation involving a death and serious injuries.

The claims of Barzelis and Cotsirilos had been tentatively settled at the time of the trial, although final settlement

papers were not signed until sometime after the Kulikowski-Williams trial was completed. Hence, the form of judgment ordered signed by the District Court Judge (A.R. 26-27).

There has never been any question as to the jurisdiction of the court to try the ancillary issues raised in Kulikowski v. Williams, and the statutory jurisdiction is firmly supported by case law. *Murphy v. Kodz,* 351 F.2d 163 (9th Cir. 1965).

(b) This Court.

Jurisdiction in this Court of this appeal is conferred by Section 1291, Title 28, U.S.C.

STATEMENT OF THE CASE

The jury resolved the issue of who was negligent in running the red light, and nothing more need be said in support of its verdict. Appellant's statement of the case concerning Mrs. Kulikowski's injuries is essentially correct, except for the deletion of certain significant residual elements. They are:

1. When Mrs. Kulikowski sleeps at night, the back of her head and hips bother her. (R.T. 124)
2. Mrs. Kulikowski has a permanent crippling and disabling injury. (R.T. 189)
3. She walks with a limp. (R.T. 127-128)
4. There is marked and significant atrophy of her left calf. (R.T. 190)
5. Her activities at work are curtailed in that she must walk around the block, and periodically and intermittently elevate her left leg. (R.T. 122-123)
6. Mrs. Kulikowski must periodically get up and walk in order to increase the blood supply into the left ankle. (R.T. 125)

7. Her injury obviously gives her less agility. (R.T. 128)

8. She has lost her normal walking gait. (R.T. 128)

RES ADJUDICATA OR ESTOPPEL

Trial counsel for Appellant, Roger Perry, settled Appellant Petra Williams' crossclaim against appellees while the jury deliberated. See affidavit of Kenneth Rosengren, counsel for Appellees, attached herein as Appendix A.

This contractual action has then forever barred and precluded a retrial of this case in its form presented to the trial court below. This fact of adjudication and disposition of the claim constitutes an estoppel or amounts to res adjudicata of the matter. Hence, there is no basis for this appeal. *Di Orio v. City of Scottsdale,* 2 Ariz.App. 329, 408 P.2d 849 (1965).

ARGUMENT OF THE CASE

1. Excessiveness

This court has dealt with the subject of excessiveness concerning Arizona death and injury cases on past, but recent occasions. As late as 1967, in *United States v. Becker,* 378 F.2d 319 (9th Cir.), this court said:

> "* * * In Arizona, the fact-finder's damage award may not be overturned as excessive except where it is '* * * so excessive as to strike mankind, at first blush, as being beyond all measure, unreasonable, and outrageous * * *.' *Fulton v. Johannsen,* 3 Ariz.App. 562, 416 P.2d 983, 988."

This standard of appraisal is applicable to both death and injury cases. *Siebrand v. Gossnell,* 234 F.2d 81, 94 (9th Cir. 1956).

Also, see *Young Candy & Tobacco Company v. Montoya,* 91 Ariz. 363, 370, 372 P.2d 703, wherein the court said:

"* * * The damages, therefore, must be so excessive as to strike mankind, at first blush, as being beyond all measure, unreasonable, and outrageous, and such as manifestly show the jury to have been actuated by passion, partiality, prejudice, or corruption. In short, the damages must be flagrantly outrageous and extravagant, or the court cannot undertake to draw the line, for they have no standard by which to ascertain the excess."

The question of excessive damages was also considered in *Meyer v. Ricklick,* 99 Ariz. 355, 409 P.2d 280 (1965), at page 357, where the court said:

"The size of a verdict in a personal injury action is not alone sufficient evidence of prejudice and passion on the part of the jury. *Keen v. Clarkson,* 56 Ariz. 437, 108 P.2d 573. The amount of damages for personal injury is a question particularly within the province of the jury. *Wise v. Monteros,* 93 Ariz. 124, 379 P.2d 116. The jury's judgment is to be sustained unless it is so exorbitant as to indicate passion, prejudice, mistake or a complete disregard of the evidence and instructions of the court. *City of Yuma v. Evans,* 85 Ariz. 229, 336 P.2d 135."

Further, at page 356, *Meyer v. Ricklick, supra:*

"In an action for personal injuries, the law does not fix precise rules for the measure of damages but leaves their assessment to a jury's good sense and unbiased judgment. *Young Candy & Tobacco Co. v. Montoya,* 91 Ariz. 363, 372 P.2d 703; *Rodgers v. Bryan,* 82 Ariz. 143, 309 P.2d 773. Where there is conflicting evidence as to the extent of a motorist's injuries in an automobile collision, it is a question for the jury. It is not for the trial court nor for appellate court on appeal to determine the amount of money which would compensate plaintiff for her injuries. *Keen v. Clarkson, supra.* See also, *Pierson v. Hermann,* 3 Ohio App.2d 398, 210 N.E.2d 893."

Since this Court has cited *Fulton v. Johannsen,* 3 Ariz. App. 562, 416 P.2d 983 (1966), with approval, it is appropriate to point out that the appellate courts have a right to take into account attorney's fees in considering excessiveness of the personal injury judgment. In *Alabam Freight Lines v. Thevenot,* 68 Ariz. 260, 204 P.2d 1050 (1949), and *Fulton v. Johannsen, supra,* the court said:

> "In addition he will have to pay his attorneys for their work. While we don't know the amount of their fee, it is reasonable to expect they will collect the usual percentage of recovery in cases as this, which will in turn lower his recovery."

Here is a summary of the impact of the injuries upon Mrs. Kulikowski, who was forty-seven (47) years of age at the time her injuries were sustained, and who worked as a verifier for the Industrial Commission of the State of Arizona.

1. She is in constant pain five years after the accident. (R.T. 128)
2. She has a sit-down type of job, and she has to keep her foot elevated and resting on a box while at work. (R.T. 122)
3. Periodically she must get up and walk around in order to exercise the ankle to keep it from swelling further. (R.T. 122-23)
4. It bothers her to sit down as much as is required. (R.T. 122)

Apart from her disabled and crippling ankle injury, Mrs. Kulikowski summarized her condition five years after the accident in the following dialogue:

> "Q. Aside from the problems and difficulties with your ankle, you have pretty well recovered, have you not, from the other injuries that you sustained?

A. Pretty well recovered, except that when I sleep at night, my hips bother me and the back of my head. I just have this trouble, so I wake up quite often at night. But the main fact is my foot that gives me so much trouble.

Q. All right. Would you describe for the jury what —how that foot bothers and how it troubles you and what kind of pain you experience with it?

A. The thing with it is it just blows up and swells up at the ankle, and then all the ligaments all around the side of the leg, and everything else, whenever it gets bad, when I step on it, it's like a badly sprained ankle. It can't hold me, and it pains me terribly; and the only way to relieve the pain, I have to get up and keep walking to circulate—to get most of the pain off of it because it's the circulation. Then it goes all the way up to my knee. I have a very bad knee from it where I can't even put any weight on the knee on it, and it's just like a long pain all the way from the knee to the ankle, and it even gets into my hip." (R.T. 124-125)

In addition to suffering constant pain, Mrs. Kulikowski has a crippling limp:

"Q. Now, does this disability with your ankle cause you to limp a little bit?

A. All the time.

Q. And why do you limp then, because of the pain?

A. Of the pain, because whenever I step on it, from the heel and in through the ankle, I always—it just pains. I can feel a shooting pain; and I walk slowly, I feel better. As soon as I try to go a little faster, it starts hurting; so I just learn from experience and if I just walk slow, I don't suffer so much."

Q. Is this pain more or less a constant thing, Mrs. Kulikowski?

A. It is. And I have noticed that the—when I sit all week, and then when I get home and over the weekend where I try to accomplish more, stay on my feet too

much, then when I get up the next morning, I can't put any weight on my feet at all. Like if I work all day Saturday, I have an awful time. Then I limp very badly, and the pain is much worse.

And like Dr. Nichols told me, I can't give it too much exercise or I can't overdo it; and then I need circulation, so I need to meet a happy medium. But in my work I can't get it organized that way."

Dr. Nichols verified that Mrs. Kulikowski was in constant pain five years after the accident in his testimony (R.T. 187), wherein he said:

"Q. * * * She complains of constant pain, doctor. Is that consistent with this type of injury?

A. Well, I think it is inasmuch as by examination and x-rays Mrs. Kulikowski has developed a significant arthritic condition of her left ankle."

Dr. Nichols was concerned about the significant traumatic arthritis, which because of the severity of the injury came on in a relatively rapid fashion (R.T. 186-87), and the marked atrophy or shrinking of her left calf (R.T. 190), all caused by the constant limping.

The only way to relieve Mrs. Kulikowski's pain is the impractical solution of keeping her in bed or in a position where she does not have to work. In the event the pain becomes so progressively severe that she is no longer able to walk, then and only then does Dr. Nichols plan to do the radical surgical procedure known as the fusion operation (R.T. 188). This carries with it, of course, the proposition of an ankle which would have absolutely no motion at all. Dr. Nichols testified that a fusion operation is in no way a 100% affair, that it is not a routine surgical procedure, and if the fusion operation was performed, Mrs. Kulikowski would not be free of discomfort or pain in the foot because

the joints that were then being used would be used more than they normally would because they are taking up the motion of the ankle joint that has been fused (R.T. 189).

Appellant is incorrect in contending on Page 12 of her Opening Brief that a fusion operation would make Mrs. Kulikowski's ankle "painfree." It would markedly diminish her pain, but it would not eliminate it.

The hospital records, an exhibit in the case, shed further light on some of Mrs. Kulikowski's injuries.

Dr. Nichols was but one of her treating physicians. Others were: Phillip William Kantor, M.D.; Sam Schwartz, D.O.; Leonard R. Karp, D.D.S.; Sidney H. Segal, M.D.; A. E. Cruthirds, M.D.; W. J. Nelson, M.D.; James C. Zemer, M.D. (R.T. 123-24).

Mrs. Kulikowski had soft tissue injuries—bruises, contusions and lacerations aside from the ankle fractures which have been discussed (R.T. 179); her mouth, teeth and bridgework were injured (R.T. 120-158); she contracted pneumonia (R.T. 183); her hands and fingers were injured (R.T. 120-158); multiple fractures of the pelvis (R.T. 180), and because of the trauma, Mrs. Kulikowski had hypertension and anxiety (R.T. 179).

Mrs. Kulikowski was bedridden until about April, in a wheelchair for about three months, and used a couple of crutches until the middle of September. Finally graduated to one crutch, which she used for about six months, and then a cane for a couple of years, and now uses her cane intermittently and periodically when the pain is unbearable (R.T. 120-21).

This accident affected her looks, her appearance, and its aging impact was brought out by the witness Thressie McCarty, who said:

> "As far as I know, she *was* very healthy. She was very active." (R.T. 157) (Emphasis added)

"She *was* a young woman. She acted like a young woman." (R.T. 157-58) (Emphasis added)

Mrs. McCarty further testified that after the accident:

"Well, *I walked over to the bed and in plain words, she was a mess.* She had ice packs all around her head, her lips were terrifically swollen, and they were almost turned back, and you could see cut places inside her mouth. Her hand was laying on the outside of the coverlets, and I could see stitches on her fingers; and I thought she was under heavy opiates or else she was unconscious because I don't think she ever knew I was there." (R.T. 158) (Emphasis added)

"* * * In sitting so long her foot would swell, and the maintenance man and some other men made her a box where she could elevate that leg; and, of course, it was quite uncomfortable to have her leg out stiff and you are key punching, you know. She had a time." (R.T. 160)

The amount of injuries and their impact as well as the crippling effect upon Mrs. Kulikowski could best be appraised by the jury and the court, who lived through the courtroom atmosphere. The jury was in the best position to appraise Mrs. Kulikowski's concern, anxiety, and apprehension in not being able to perform her job with complete effectiveness (R.T. 122-23). Likewise, the amount of shrinkage and atrophy to her left calf (R.T. 190), and the aging effects and impact of all these injuries on this young woman (R.T. 157-58).

Appellant embarked on no cross-examination of the medical expert and presented no medical testimony or medical evidence.

The case was not stripped of the human equation nor devoid of atmosphere and drama, nor is any trial, as was said in *Maryland Casualty Co. v. Reid*, 76 F.2d 30, 32 (5th Cir. 1935):

> "It affects the witnesses, the lawyers, the litigants, the triers themselves. It is entirely true that many verdicts in criminal and in civil cases find their real spring in an atmosphere generated by the trial, where things felt but unseen, sometimes real, sometimes illusory, arising out of but more than the relevant testimony, in the end induce the verdict more than the testimony itself does."

Based upon the foregoing, how can it be said that this verdict is excessive by *any* standard, let alone the yardstick which binds this court, to-wit:

> "* * * so excessive as to strike mankind, at first blush, as being beyond all measure, unreasonable, and outrageous." *United States v. Becker, supra.*

2. Earning Capacity Issue.

Before the jury received the case, counsel conferred with the court and agreed to the instructions that were to be given. These instructions included an instruction concerning future medical expenses and an instruction concerning the loss of or decrease in earning power or capacity (R.T. 348-49). *There was no objection to any of the instructions given to the jury, including the instruction concerning injury to or loss of earning capacity.* At the conclusion of the case, the judge called counsel to the bench and, outside of the hearing of the jury, asked counsel:

> "THE COURT: Does the defendant or in this case cross-claimant, Petra Williams, have any further objections to the instructions the court has read?
> MR. PERRY: *No, your Honor.*" (R.T. 352)

Hence, counsel cannot now at this late date complain about that instruction. See *Orlando v. Northcutt,* ..... Ariz....., 441 P.2d 58 (1968).

Furthermore, under the evidence, the instruction was warranted. As a result of the accident, Mrs. Kulikowski—

1. Has a permanent, crippling and disabling injury (R.T. 189);

2. Walks with a limp (R.T. 127-28);

3. Has marked and significant atrophy of her left calf (R.T. 190);

4. Is curtailed in her activities at work in that she must walk around the block and periodically and intermittently elevate her left leg (R.T. 122-23);

5. Gets up periodically to walk in order to increase the blood supply into the left ankle (R.T. 125);

6. Has an injury which obviously gives her less agility (R.T. 128); and

7. Has lost her normal walking gait (R.T. 128).

Her doctor testified that this is a permanent condition with or without a fusion operation (R.T. 189).

Under such circumstances, the jury could reasonably find from such evidence that this type of injury would result in decreased earning power. As was said in *Atchison, Topeka and Santa Fe Railway Co. v. Parr,* 96 Ariz. 13, 19, 391 P.2d 575 (1964):

> "* * * Even if the prospective operation were completely successful, there would be a 'permanent disability and stiffness of the foot.' This would result, * * * in less endurance, a decrease in agility, poor balance and coordination, less ability to tolerate jumping on the foot, and loss of normal gait. A jury could reasonably find such evidence that this kind of permanent injury would result in decreased earning power * * *."

The only two parties in court were Mrs. Petra Williams, a widow with three children (R.T. 280), and Mrs. Kulikowski, who is married to a totally disabled American veteran (R.T. 109). In Arizona a personal injury award is community property, and Frank Kulikowski is a party. Mrs. Kulikowski was the breadwinner in her family as was Mrs. Williams

in her family. Mrs. Kulikowski has been working at the Industrial Commission for over sixteen years (R.T. 109). The fact that Mrs. Kulikowski was obliged to work in order to support herself and her disabled husband was a material and relevant fact in the case (R.T. 121), and since it had bearing on her returning to work prematurely before she should have and while she was in such poor physical condition (R.T. 160). The reason for her working was an ingredient in the lawsuit.

Her worry, concern, anxiety, and hypertension concerning her activities and household duties and responsibilities were germane and material and necessary background.

Mrs. Kulikowski's lot in life was an adjunct to the proof. She is not to be penalized for having a disabled husband, and the jury was entitled to know her family circumstances just as it was entitled to know that Mrs. Williams was a widow with three daughters (R.T. 195). Were Mrs. Kulikowski to appear in the role of "Madam X" with no basic background facts supplied, the jury might well wonder why everyday common information was suppressed or hidden from them.

The evidence concerning Mrs. Kulikowski's having and supporting a disabled husband entered the case without objection from appellant's counsel, as set forth in the transcript:

"BY MR. ROSENGREN:

Q. And what does your husband do?

A. He is a totally disabled veteran." (R.T. 109)

"BY MR. ROSENGREN:

Q. You were out of work for how many months?

A. Nine months.

Q. And then you went back?

A. Then — yes, I went back. I had to go back, my husband is disabled." (R.T. 121)

"By Mr. Perry:

Q. All right. Was there any restriction on your driver's license?

A. No, sir.

Q. Did your driver's license require that you drive a car only with an automatic transmission?

A. Yes, sir.

Q. Why was that?

A. Well, my husband is disabled, and that is the only car he could drive, so we had that one car so both of us could drive it." (R.T. 136-37)

Appellant cites *Sanchez v. Stremel,* 95 Ariz. 392, 391 P.2d 557, which contains dicta wholly unrelated to our fact situation in Kulikowski. In *Sanchez,* the court said at page 394:

> "Throughout the trial plaintiff's counsel made improper attempts to blacken the characters of defendant and his passenger, and about half of the trial was taken up by his attempts to go into irrelevant matters. Plaintiff's counsel acted as if this were an alienation of affections suit, and not an automobile accident case."

The occupation of the plaintiff Frank Kulikowski, or the lack thereof, is relevant and material. It is necessary background. It has the same degree of relevancy (he being a party and an indispensable one under Arizona law) as Mrs. Williams being a widow (R.T. 192-280) and a self-employed interior decorator (R.T. 193-280), who had her three daughters to look after (R.T. 195).

The Kulikowski case is thus distinguishable from *Sanchez v. Stremel, supra:* Mrs. Kulikowski had to support her husband; the reasons for her working were material and relevant; her concern and anxiety was material and relevant, and the issue was in no wise brought forth to inject prejudice. The trial court is in the best position to determine the issue of whether or not a party is attempting to interject

prejudice and/or contrast the wealth of the parties. *Tanner v. Pacioni,* 3 Ariz. App. 297, 413 P.2d 863 (1966).

Furthermore, in Arizona the trial judge is vested with considerable discretion in determining the relevancy and admissibility of evidence. *City of Phoenix v. Boggs,* 1 Ariz. App. 370, 373, 403 P.2d 305 (1965).

An oft quoted case in the Federal System concerning damage or injury to earning capacity is *Mabry v. Travelers Insurance Company,* 193 F.2d 497 (5th Cir. 1952), wherein Judge Edwin Holmes stated:

> "Pinched by poverty, beset by adversity, driven by necessity, one may work to keep the wolf away from the door though not physically able to work; and under the law in this case, the fact that the woman worked to earn her living did not prevent the jury from finding, from the evidence before it, that she was totally and permanently disabled while she was working."

3. The Alleged Misconduct of Appellees' Counsel.

The main thrust of appellant's appeal is that there was improper argument, yet *no objection was made to counsel's arguments concerning damages, and no objection or exception was made to the use of a chart illustration. Appellant took no exception, nor did appellant move for mistrial on these grounds.* Counsel for appellant did nothing. Instead he characterized the use of the chart as "mathematical legerdemain" and "chicanery." (R.T. 317)

He never asked the court for curative instruction nor did he request the court to admonish the jury concerning the subject. He in short waived error, if any. Appellant is forestalled and precluded from raising the issue at this time.

In *Maryland Casualty Co. v. Reid, supra,* at page 33, the court said:

> "Ordinarily, if his counsel fails to adequately object, or fails to except to adverse action on his objection, a litigant may not complain of what occurred as error, for he will be treated as having assented to it. On the other hand, a trial judge may never abdicate his function, or surrender to counsel the conduct of the trial. It is still his primary duty to oversee and conduct it. Because this is so, he may, and if he fails to, the appellate court may, though no objection is made and no exception taken, correct an error of abdication which has resulted unjustly, by voiding the trial. But this will be done only in extreme cases, where the judge's error in permitting the trial to get out of bounds, instead of exercising his function to guide and control it, is of such transcendent influence on the course of the trial as that, though not excepted to, justice requires its being noticed and corrected. One, therefore, who brings an appeal here in a case at law must show either an unexcepted to error of abdication so glaring that its effect upon the conduct of a trial may not be doubted, or that he had recourse to and exhausted all the means and aids to obtain relief available below."

In Appellant's memorandum of points and authorities in support of her motion for new trial, the thrust of her argument was that the use of the blackboard in argument violated *Botta v. Brunner,* 26 N.J. 82, 138 A.2d 713, 60 ALR2d 1331. The one United States Court of Appeals case which supported that position—*Johnson v. Colglazier,* 348 F.2d 420 (5th Cir. 1965)—has now been overruled. In *Baron Tube Company v. Transport Insurance Company,* 365 F.2d 858 (5th Cir. 1966), the entire Circuit, sitting en banc on March 1, 1966, specifically reversed *Johnson v. Colglazier, supra,* and cited *Maryland Casualty Company v. Reid, supra,* with approval. The United States Courts of Appeals are now *unanimous in not* following *Botta.*

The complaint is made that counsel for appellees is guilty of misconduct in putting forth suggested figures that were in his view fair and equitable. However, that very course of conduct was sanctioned and approved in *Rush v. Cargo Ships & Tankers, Inc.,* 360 F.2d 766 (2nd Cir. 1966), wherein the court said:

> "Finally, appellant suggests that it was reversible error when the court refused to charge the jury to ignore plaintiff's counsel's argument concerning a unit of time or per diem measurement of damages for pain and suffering. Despite the fact that the great weight of authority adopts a flat rule, either approving or disapproving such argument, see the cases collected in *Johnson v. Colglazier,* 348 F.2d 420 (5th Cir. 1965), we are unwilling to adopt such a rule. See *Pennslyvania R. Co. v. McKinley,* 288 F.2d 262 (6th Cir. 1961). We do not necessarily agree, however, with that language of McKinley which suggests that the appellate court will reverse only if there resulted 'a miscarriage of justice or deprived one of the parties litigant of a fair trial.' 288 F.2d at 267.
>
> "We do hold that under the circumstances of this case as disclosed by the record before us, it was proper to deny the request. While the argument itself was not reported, and therefore is not before us, a circumstance we regret, there is no suggestion that there was an improper appeal to passion and prejudice other than the bare words used. *Furthermore, as the trial judge noted, plaintiff's counsel indicated that his figures were only suggested, that the jury might find them too high or too low, and that it was the jury's determination that controlled."* (Emphasis added)

Essentially, the language emphasized above in *Rush v. Cargo Ships & Tankers, Inc., supra,* was used in argument by counsel for appellee, and there was no objection or exception to it at the time:

> "I think I am going to be asking for figures that you think will be fair and equitable and just; and if you do not think that they are fair and equitable and just, then I want you to come in with some other figures. But I am going to put them forth now in my advisory capacity as her lawyer." (R.T. 294)

Furthermore, the *Rush* case was appealed to the U.S. Supreme Court, certiorari denied, 385 U.S. 961 (1967).

In the Federal system, the case of *Pennsylvania Railroad Company v. McKinley,* 288 F.2d 262 (6th Cir. 1961), the Court of Appeals upheld a plaintiff's verdict where the per diem argument was used. The court said:

> "Briefs of counsel suggest that in our decision of the instant appeal we must choose between the so-called Botta rule and those authorities which appear to approve what was done by plaintiff's counsel in this case. It is urged that from this choice we must fashion and adopt for this court a rule of practice that will control trials that follow our decision here. We decline to do so. Although defendant's motion for a new trial averred that the verdict was excessive, no such claim is made on this appeal. We, therefore, find it unnecessary to announce a procedural blueprint to be followed in all future trials. The jury's verdict was indeed a large one, but the judge who presided at the trial and who heard the evidence did not find it excessive. Control of the conduct of counsel so as to keep it within the limits of legitimate advocacy is primarily the duty and responsibility of the trial judge. We will not find error in his discharge of such duty unless we are persuaded that what he did, or failed to do, in matters within his discretion resulted in a miscarriage of justice or deprived one of the parties litigant of a fair trial. * * *"

While the propriety of argument is a federal question and a matter of federal procedure, *Baron Tube Company v.*

Transport Insurance Company, supra, the Arizona cases would not give appellant comfort. In *Myers v. Rolette,* ..... Ariz. ....., 439 P.2d 497 (1968), the court said:

> "For convenience of discussion, we shall combine the three remaining questions raised by the appellant as they all have reference to the same general subject of damages. In plaintiff's closing argument to the jury, he presented the issue of damages through a chart utilizing what has been characterized as the "formula method" or "per diem method" of computation of damages. There was no objection to the plaintiff's use of the charts and during defendant's argument to the jury counsel referred to the figures in plaintiff's chart in an attempt to demonstrate their inaccuracy. At no time during the trial did defendant object to the use of the chart and the method of computation. Defendant's failure to object constituted a waiver. *Beliak v. Plants,* 93 Ariz. 266, 379 P.2d 976 (1963)."

The use of charts generally has been sanctioned in Arizona courts specifically in *O'Rielly Motor Company v. Rich,* 3 Ariz.App. 21, 411 P.2d 194 (1966).

The Arizona courts, like the federal courts, give counsel broad latitude in discussing in argument to the jury facts supplied by the evidence and inferences to be drawn therefrom. *Aguilar v. Carpenter,* 1 Ariz.App. 36, 399 P.2d 124 (1965); *Beliak v. Plants,* 93 Ariz. 266, 379 P.2d 976 (1963); and *City of Phoenix v. Boggs,* 1 Ariz.App. 370, 403 P.2d 305 (1965).

The court admonished the jury on a number of occasions that the arguments of counsel were not evidence. The court prefaced the arguments of counsel with the following statement:

> "I would remind you, as I have said earlier, that statements of counsel are not evidence. The facts in this case are as you determine them to be; and regardless of what counsel may inadvertently say, and if you feel

> that the facts are different than counsel may represent the facts to be or have been, it's, of course, your determination that counts." (R.T. 290)

This type of argument, the style of argument of appellees' counsel was precisely that which was outlined as a lawyer's duty by Judge John R. Brown of the Fifth Circuit, in his vigorous dissenting opinion in *Johnson v. Colglazier, supra,* when he said:

> "Although there are some formal limitations upon the extent to which counsel in argument may express his personal opinions, his whole presence there, every word, every gesture, every inflection is to persuade the jury to find the critical issues in his client's favor. What he is obviously doing is telling the jury what he, as the advocate, desires them to do."

Appellant further contends that appellees' damage argument violated Canon 15, Canons of Professional Ethics, yet there was no objection to the argument on such grounds, nor was exception taken thereto, nor was there any motion for mistrial on such grounds. At the time of trial there was no complaint in any way, shape or form that counsel for appellees was "testifying," "worming his way into the confidence of the jury," or "injecting unsworn opinion evidence in his argument to the jury."

In the recent criminal case of *State v. Abney,* ..... Ariz. ....., 440 P.2d 914 (1968), the Supreme Court of Arizona affirmed the conviction notwithstanding the prosecutor having told the jury that in his opinion the defendant was guilty. In that case the defendant immediately moved for a mistrial on that ground, but the court noted that the trial judge had instructed the jury "arguments of counsel are not evidence in the case" (just as was done in the case now before this court on at least four separate occasions [R.T. 5, 6, 290, 342]).

The *Abney* case followed earlier Arizona law, *State v. Titus,* 61 Ariz. 493, 152 P.2d 129 (1944), wherein the failure of defendant to object to an expression of opinion by the prosecuting attorney that the defendant was guilty, and the failure to make a request that such remark be expunged from the record, and the failure to request the court to direct the jury to disregard such remark preserved no question for review on appeal.

This is the law in Arizona in 1968, and has been for many years, even in the criminal field where the rights of individuals are so meticulously guarded.

Union Pacific R. Co. v. Field, 137 F. 14 (8th Cir.), cited by appellant, is irrelevant to the limited issues before this court.

CONCLUSION

1. Appellant Petra Williams had a fair trial, settled her case with the insurance carrier for the appellees, and received monetary consideration therefor. Hence, her appeal has been adjudicated and she should be estopped from proceeding further.

2. The damages are not excessive as a matter of law under the yardstick used to measure excessiveness, to-wit:

> "In Arizona, the fact-finder's damage award may not be overturned as excessive except where it is '* * * so excessive as to strike mankind, at first blush, as being beyond all measure, unreasonable, and outrageous * * *.' *Fulton v. Johannsen,* 3 Ariz. App. 562, 416 P.2d 983, 988." *United States v. Becker,* 378 F.2d 319 (9th Cir. 1967)

3. The argument of counsel concerning issues now complained of was not objected to, nor was exception taken thereto, nor were curative instructions requested.

4. The jury was properly instructed and arrived at a fair, just and equitable verdict which was sanctioned, approved and ratified by the trial judge.

Hence, the judgment should be affirmed.

Respectfully submitted,

KENNETH ROSENGREN
303 Luhrs Building
Phoenix, Arizona 85003

Attorney for Appellees

(Appendix A Follows)

Appendix A

AFFIDAVIT

State of Arizona
County of Maricopa—ss.

Kenneth Rosengren, being first duly sworn upon his oath, deposes and says:

That he is the attorney for the Cross-Claimant, Cross-Defendant Kulikowski. That at approximately 5:30 p.m. on November 3, 1967, and while the jury was deliberating, he was in consultation with Roger Perry, Esq. in the offices of Snell & Wilmer, on a matter foreign to the issues of this lawsuit. At said time and place Mr. Perry advised this affiant that he had by telephone exercised an option to settle Mrs. Williams' claim against Mrs. Kulikowski. Your affiant has confirmed the fact of settlement at said time and place with the offices of O'Connor, Cavanagh, Anderson, Westover, Killingsworth & Beshears, as well as the State Farm Insurance Claims Representative for Kulikowski.

The case was settled on exercise of the option and during jury deliberation by Mr. Perry for the sum of $1,250.

Further affiant saith not.

Kenneth Rosengren
Affiant

Subscribed and Sworn to before
me this 17th day of November, 1967.

Helen M. Rich
Notary Public

My Commission Expires 7/29/71